

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FEDERAL AVIATION ADMINISTRATION, :

4 ET AL., :

5 Petitioners : No. 10-1024

6 v. :

7 STANMORE CAWTHON COOPER. :

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9 Washington, D.C.

10 Wednesday, November 30, 2011

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:07 a.m.

15 APPEARANCES:

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18 behalf of Petitioners.

19 RAYMOND A. CARDOZO, ESQ., San Francisco, California; on
20 behalf of Respondent.

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1 P R O C E E D I N G S

2 (11:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 10-1024, Federal Aviation
5 Administration v. Cooper.

6 Mr. Feigin.

7 ORAL ARGUMENT OF ERIC J. FEIGIN

8 ON BEHALF OF THE PETITIONERS

9 MR. FEIGIN: Mr. Chief Justice, and may it
10 please the Court:

11 If Congress had intended to waive the
12 sovereign immunity of the United States to allow
13 uncapped emotional distress claims under the Privacy
14 Act, it would have and was required to state that waiver
15 clearly and unambiguously in the statutory text. The
16 substantive requirements of the act sweep far beyond any
17 pre-existing common law protection of privacy to impose
18 a detailed set of new and pervasive requirements on the
19 collection, maintenance, use and dissemination of
20 millions of Federal agency records.

21 The act, for example, forbids agencies from
22 keeping too much information about an individual,
23 compels agencies to collect information about an
24 individual, when practicable, from the individual
25 himself and not from other sources, and can require

1 agencies to safeguard information about an individual
2 even when that information is otherwise already publicly
3 available.

4 Congress would not have taken lightly the
5 question of whether to expose the United States to
6 expansive damages for intentional or willful violations
7 of these novel recordkeeping requirements. Indeed, the
8 way in which the district court believes that the Social
9 Security Administration violated the Privacy Act in this
10 case is something that never would have been actionable
11 at common law and never would have resulted in emotional
12 distress recovery.

13 JUSTICE GINSBURG: Then maybe Congress
14 shouldn't have passed this statute. But the injury, the
15 invasion of privacy, that's not something where
16 pecuniary damages are -- are prime if they exist at all.
17 I mean, this is -- the -- the tort that this is
18 comparable to is intentional infliction of emotional
19 distress. The -- the person who is subject to this, to
20 this embarrassment, this humiliation, doesn't have
21 out-of-pocket costs, but is terribly distressed,
22 nervous, anxious, and all the rest.

23 The -- the act that the Congress is
24 reaching, the impact of it is of that nature, not -- I
25 mean pecuniary damages, you know, ordinarily attend

1 conduct that embarrasses, humiliates you, causes mental
2 distress.

3 MR. FEIGIN: Well, first of all, Justice
4 Ginsburg, I would like to respectfully disagree with the
5 premise of the question that the Privacy Act is
6 comparable to common law invasion of privacy. All the
7 requirements I just described that are under the Privacy
8 Act would not have existed at common law invasion of
9 privacy even though common law invasion of privacy was,
10 as you say, compensable with emotional distress awards.
11 In fact, even if we focus just on the disclosure-related
12 provision of the Privacy Act, it itself is much broader
13 than common law invasion of privacy.

14 JUSTICE GINSBURG: Even if it is -- even if
15 it is, the damages are -- the damages are not of a
16 pecuniary kind. So you could say that Congress was much
17 more generous than the common law was, but the impact on
18 the person who is suing is not going to be out-of-pocket
19 business loss, pecuniary loss; it's going to be the
20 embarrassment, the humiliation. So it's -- it's -- if
21 Congress wanted to do something about the impact on the
22 person it has given a right, it's not going to do
23 something that has to do with pecuniary damages it's not
24 likely the person in -- in this plaintiff's situation is
25 not likely to suffer.

1 MR. FEIGIN: Well, first of all, Your Honor,
2 there sometimes are, as there were at common law,
3 pecuniary damages resulting from either violation of the
4 Privacy Act or invasions of privacy; and the government
5 sometimes pays out very large pecuniary judgments.

6 But to get to the core of your question
7 about why Congress might not in the Privacy Act have
8 provided an emotional distress award, I think the text
9 of the act demonstrates that Congress thought about the
10 possibility of providing an emotional distress award,
11 but decided not to do that in the initial version of the
12 act that it passed in 1974. Instead, that version of
13 the act in section 5(c)(2)(B)(iii) assigned to the
14 Privacy Protection Study Commission the task of making a
15 recommendation as to whether the act should later be
16 expanded to provide for general damages. The commission
17 understood its mission to -- was to determine whether
18 the act ought to be expanded to provide for dignitary
19 and reputational harms, such as compensation for
20 emotional distress. And the Privacy Commission further
21 understood that the act as it had been enacted provided
22 only for actual damages, which it interpreted as
23 synonymous with special damages.

24 JUSTICE GINSBURG: But that's the -- why --
25 is it -- is a harm to a dignitary interest, is that an

1 actual injury?

2 MR. FEIGIN: Well, Your Honor --

3 JUSTICE GINSBURG: You describe that injury.

4 I mean there is an injury, the emotional distress,
5 humiliation; is that an actual injury?

6 MR. FEIGIN: Your Honor, the term "actual
7 injury" and the term "actual damages," those are
8 ambiguous terms. Sometimes they might include emotional
9 distress and sometimes they might not.

10 JUSTICE GINSBURG: Well, let's take this
11 case. Did the plaintiff suffer an actual injury?

12 MR. FEIGIN: He did not --

13 JUSTICE GINSBURG: At least, did he allege
14 that he had suffered an actual injury?

15 MR. FEIGIN: He did not suffer actual
16 damages within the meaning of the Privacy Act.

17 JUSTICE GINSBURG: I didn't -- I didn't ask
18 you that. I asked you did he suffer an actual injury,
19 as opposed to someone who is complaining about
20 something -- an abstract right or an abstract theory?
21 Is there an actual injury here?

22 MR. FEIGIN: Well, Your Honor, I think my
23 difficulty with the question is that I don't think the
24 term "actual injury" has some plain meaning out of
25 context. And the term that the Privacy Act uses is

1 actual damages. I think in the context of the Privacy
2 Act, as well as in other contexts -

3 JUSTICE GINSBURG: You have to have an
4 injury first before you can get damages, so my question
5 is was there an injury.

6 MR. FEIGIN: Well, if Your Honor's question
7 is whether he suffered an adverse effect within the
8 meaning of section (g)(1)(B) of the act --

9 JUSTICE GINSBURG: Yes.

10 MR. FEIGIN: -- yes, we believe he did
11 suffer an adverse effect sufficient to confer standing.
12 But this court in Doe described the adverse effect
13 requirement as simply codifying the Article III standing
14 requirements and made very clear that simply because a
15 plaintiff may have suffered an adverse effect that
16 doesn't mean that the plaintiff suffered actual damages.
17 But Justice Ginsburg --

18 JUSTICE SOTOMAYOR: I'm a little bit
19 confused by that, because in your brief, the Solicitor
20 General's brief in Doe, it described the earlier version
21 of general damages in the following way -- and I'm
22 quoting from your brief there: "The general damages
23 provision in the Senate bill likely derived from the
24 common law of tort of invasion of privacy where general
25 damages may be awarded as" -- quote -- "'presumed

1 damages,' without proof of harm."

2 So I think there in Doe you argued that
3 general damages presumed injury. But that's very
4 different than, I think, the question Justice Ginsburg
5 was asking you. It's -- and I read your brief and your
6 arguments as sort of an -- an assumption that if you
7 suffer nonpecuniary harm, you haven't been injured.

8 MR. FEIGIN: Well, Your Honor --

9 JUSTICE SOTOMAYOR: There is a big
10 difference between presumed damages and proven injury.
11 In Gertz we reference the common law tort as requiring
12 actual proof of injury for emotional distress. Most
13 State laws say you have to prove the emotional distress.
14 We are not presuming the injury. So, I guess what I'm
15 saying to you, aren't you the one confusing what injury
16 is from presumed damage?

17 MR. FEIGIN: I hope not, Your Honor. But
18 the -- the -- I think to get at your question, what we
19 said in the Doe brief is that general damages are a type
20 of presumed damages, and that's correct under the common
21 law, but that isn't all that general damages
22 encompasses. General damages, as the Court recognized
23 in Doe, are always presumed, in the sense that they are
24 always assumed -- this is the common law definition of
25 general damages -- are always presumed in the sense that

1 they are always assumed to have taken place and an award
2 of general damages can be made even without specific
3 proof of specific harm. But in cases where a -- at
4 common law, in cases where a plaintiff did introduce
5 evidence of the extent of, for example, the emotional
6 distress that he had suffered. So if he wanted to say I
7 am not happy with the presumed damages that you would
8 give to just anybody who had suffered this invasion of
9 privacy, I have a particularly sterling reputation or I
10 am particularly sensitive to this sort of thing, I
11 suffered a -- an increased amount of harm from what you
12 might presume the average person would suffer, The award
13 that that person would receive is --.

14 JUSTICE SOTOMAYOR: So why is that different
15 from actual injury? I have -- I'm not sleeping, I have
16 a nervous stomach, I'm not eating. The typical things
17 that juries look at to determine whether you have proven
18 emotional distress. Why is that not actual injury?

19 MR. FEIGIN: Well, Your Honor, the award
20 that person would receive for the additional proof of
21 emotional distress would be classified as general
22 damages. Now, to get to your question as to why that is
23 not actual damages. Sometimes the terms "actual
24 damages" or "actual injury" can be used to include
25 proven emotional distress, but the term is ambiguous.

1 We cite cases in footnotes 1 and 2 of our reply brief in
2 which the term "actual damages" or "actual damage" is
3 used to mean exclusively pecuniary harm.

4 JUSTICE SOTOMAYOR: I have looked at those
5 cases and in all of them except for two, where the
6 reference wasn't really precise, it was because the use
7 of "actual damages" in the particular statute were
8 limited to pecuniary harms or the nature of the harms at
9 issue were pecuniary by nature.

10 MR. FEIGIN: Well, most of those cases are
11 cases out of the common law and sometimes they used
12 "actual damages" in the same sentence with a reference
13 to emotional harm, making clear that they think that the
14 two types of harms are separate.

15 But, Your Honor, maybe I can try to explain
16 it this way. I think actually Respondent implicitly
17 agrees with our definition of general damages as
18 including proven harm. If you look at footnote 2 on
19 page 20 of the red brief and then again at page 22 of
20 the red brief, the definition of "actual damages" that
21 Respondent is offering, he divides into two
22 subcategories: Special damages and general damages.

23 Everybody agrees that special damages are
24 limited to pecuniary harm, and Respondent makes no
25 claim, nor could he, that the type of damages he is

1 seeking are special damages. So to the extent he thinks
2 that he is entitled to recovery under the act, it's
3 because he thinks that the emotional distress harm that
4 he wants to prove are general damages. And if there's
5 one thing we know about the definition of "actual
6 damages" in the act, it's that it doesn't include
7 general damages, because again Congress separately in
8 the text of the Privacy Act assigned the Privacy
9 Protection Study Commission to make a recommendation
10 about whether the act should later be expanded to
11 include general damages.

12 JUSTICE GINSBURG: What does "actual
13 damages" mean under the Fair Credit Reporting Act?

14 MR. FEIGIN: Your Honor, we don't have a
15 position on that at this point. I can describe to you
16 how we think that the inquiry would work. We think that
17 in some statutes actual damages might in context include
18 emotional distress awards. But the term "actual
19 damages" by itself in a waiver of sovereign immunity is
20 not a clear and unambiguous waiver of the United States'
21 sovereign immunity for claims of emotional distress.
22 And as for statutes which do not allow claims against
23 the United States, it would be a question of context and
24 legislative history. And we would have to do the same
25 kind of workup of the Fair Credit Reporting Act that we

1 have done of the Privacy Act in this case.

2 JUSTICE GINSBURG: But it can mean, and I
3 think it has been held to mean, damages to a dignitary
4 interest. Mental distress has been held to, the term
5 has been held to mean that under the Fair Credit
6 Reporting Act.

7 MR. FEIGIN: Yes, Your Honor. Multiple
8 courts of appeals have held that, and we are not
9 questioning that conclusion for purposes of this case
10 with the caveat that we don't think the United States is
11 subject to suit under the Fair Credit Reporting Act.

12 If the United States were subject to suit
13 under the Fair Credit Reporting Act, then because there
14 is ambiguity about the meaning of actual damages, we
15 think that the narrower interpretation as limited to
16 pecuniary harm would control.

17 One other distinction between the Fair
18 Credit Reporting Act and the Privacy Act is again, as I
19 said, the Privacy Act specifically carves out general
20 damages as a type of damages that aren't going to be
21 awarded and the Fair Credit Reporting Act does not. The
22 Fair Credit Reporting Act also has a much more
23 permissive remedial scheme, allowing in certain cases
24 for statutory damages and also allowing for punitive
25 damages. I don't think the Fair Credit Reporting Act,

1 for the various reasons I have just mentioned, is a
2 particularly good analog for the Privacy Act.

3 JUSTICE KENNEDY: I --

4 JUSTICE GINSBURG: We're discussing what the
5 term means, what the term "actual damages" means.

6 MR. FEIGIN: Well, Your Honor, again, as we
7 have demonstrated in our brief -- I think again, I'd
8 refer the Court to footnotes 1 and 2 for how this term
9 was used in the common law -- the term "actual damages"
10 can mean both things.

11 So the fact that in the Privacy Act it
12 does -- it may include emotional distress awards doesn't
13 mean that that's the sense in which Congress used it in
14 the Privacy Act -- I'm sorry; I may have said that
15 wrong. The fact that in the context of the Fair Credit
16 Reporting Act it may include emotional distress doesn't
17 mean that that's the way in which Congress used it in
18 the Privacy Act. And I think --

19 JUSTICE KENNEDY: Are there instances where,
20 if there is an invasion of privacy and there is a
21 documented trauma from psychosomatic illness with
22 medical expenses and lost wages, is that special? Is
23 that actual damage?

24 MR. FEIGIN: Yes, Your Honor. If there are
25 documented medical expenses that were out-of-pocket

1 expenses, then we think, even if they arise from
2 emotional distress, they would be pecuniary harm and
3 could be compensated under the Privacy Act.

4 JUSTICE SOTOMAYOR: I'm sorry. Are you
5 arguing that the emotional distress component can't be?

6 MR. FEIGIN: The emotional distress
7 component itself cannot be, but medical expenses to
8 treat symptoms of emotional distress --

9 JUSTICE SOTOMAYOR: So you're -- as I
10 understand the definition of "special damages" in common
11 law, if you proved any pecuniary harm you were also
12 entitled to the mental distress damages as well. So you
13 want half of the common law award -- award?

14 MR. FEIGIN: I don't think that's quite
15 correct about the definition of "special damages," Your
16 Honor. I don't think there is any dispute on this.
17 "Special damages," the term in this context is always
18 limited to pecuniary harm.

19 JUSTICE SOTOMAYOR: We may have a difference
20 of history there. Because, yes, special damages require
21 pecuniary harm, but once you prove that, it also
22 permitted recovery of nonpecuniary losses as well.

23 MR. FEIGIN: Well, Your Honor, in a common
24 law suit for defamation for --

25 JUSTICE SOTOMAYOR: I thought that's what

1 your brief said, actually.

2 MR. FEIGIN: Well, no, Your Honor. What we
3 said in our brief is in a common lawsuit for defamation
4 per quod there are two types of damages that could be
5 recovered, special damages and general damages. And
6 once a -- special damages were limited to pecuniary
7 harm. Unless a plaintiff could prove at least some
8 special damages, they wouldn't be entitled to any
9 recovery at all. If a plaintiff could prove some
10 special damages, they could recover not only special
11 damages, in other words pecuniary harm, but could also
12 recover general damages, that is damages for emotional
13 distress or other dignitary --

14 JUSTICE SOTOMAYOR: But we're not talking
15 any differently. That's what I just said. If you --

16 MR. FEIGIN: Yes, Your Honor. I think to
17 the extent I was perhaps disagreeing with you is I was
18 understanding you to say that the definition of "special
19 damages," the term sometimes includes emotional distress
20 awards. The term "special damages" is limited to
21 pecuniary harm.

22 JUSTICE SOTOMAYOR: Sort of odd for Congress
23 to borrow from the defamation context and with a defined
24 term of art, "special damages," and not use it in the
25 Privacy Act if that's what it intended.

1 MR. FEIGIN: Well, Your Honor --

2 JUSTICE SOTOMAYOR: And to use a term
3 "actual damages," which has a much broader meaning than
4 "special damages."

5 MR. FEIGIN: Well, Your Honor, as the Court
6 recognized in Doe, there is a structural similarity
7 between the civil remedies provision of the Privacy Act
8 and the remedial scheme for defamation per quod at
9 common law. And I think one reason there might be that
10 structural similarity is that defamation per quod at
11 common law solves the problem that Congress faced when
12 it was crafting the Privacy Act, which is trying to
13 figure out when a plaintiff's injuries are sufficiently
14 serious and concrete as to justify an award of damages.

15 I think it makes sense if, as the Court
16 supposed in Doe, Congress were aware of how defamation
17 per quod had solved that problem, that Congress would
18 have adopted the same limitation, in other words the
19 requirement of showing of pecuniary harm, as the
20 threshold requirement under the Privacy Act.

21 Now, Congress had very good reason to be
22 cautious about extending the scope of liability under
23 the Privacy Act. As I said, the Privacy Act regulates a
24 great deal of conduct that wouldn't have been
25 compensable at all in common law, let alone resulted in

1 any sort of emotional distress award.

2 Now, Congress recognized, I think, some of
3 the concerns that Justice Ginsburg and Justice Sotomayor
4 have raised about why plaintiffs might in some instances
5 deserve recovery for emotional distress. But it
6 recognized that there are arguments on both sides, on
7 both sides on that issue. And what it decided to do in
8 the Privacy Act was to defer that issue for later and
9 assign the Privacy Protection Study Commission to make a
10 recommendation about whether the scope of liability
11 under the act --

12 JUSTICE GINSBURG: Well, the -- the Privacy
13 Study Commission coming after can't say what the statute
14 means. I mean, that would be post-legislative history.
15 I mean, the statute exists and then we have a Study
16 Commission to see what amendments might be made. But
17 the Study Commission can't decide what the act means.

18 MR. FEIGIN: Well, two points on that, Your
19 Honor. First of all, the reference of the general
20 damages issue to the Privacy Protection Study Commission
21 is in the text of the act that Congress enacted in 1974,
22 so the exclusion of general damages doesn't depend at
23 all on anything the Privacy Protection Study Commission
24 said.

25 As to the weight we think the Privacy

1 Protection Study Commission report should receive, first
2 of all we think it's very telling evidence that there is
3 at the very least ambiguity about what the term "actual
4 damages" could mean. The Privacy Protection Study
5 Commission interpreted the term "actual damages" in
6 precisely the same way that we do in our brief. That
7 is, as special damages, as that term was understood in
8 defamation torts at common law, which the Privacy
9 Protection Commission Study report makes very clear at
10 page 530 is limited to pecuniary harm.

11 I think, if for no other reason than that
12 that's a reasonable reading, I think the sort of
13 judicial restraint that is embodied in the canon that
14 requires courts to construe waivers of sovereign
15 immunity narrowly requires this Court to adopt that
16 narrower reading, because it shows that the narrower
17 reading is at the very least a reasonable one or, as the
18 Court said in *Nordic Village*, is a plausible one.

19 I -- I think it would have been very unusual
20 for Congress silently or ambiguously to have decided to
21 open the door to emotional distress awards under the
22 Privacy Act. As I've said, the Privacy Act is quite a
23 broad, substantive act that would have exposed the
24 government to damages in -- in very new ways. And I
25 think this case illustrates -- illustrates that.

1 The district court here concluded that the
2 law enforcement-related disclosure of Respondent's
3 medical information by the Social Security
4 Administration was in fact authorized under the Privacy
5 Act by a routine use published in the Federal Register.
6 But it concluded that Respondent could nevertheless
7 bring suit against the Federal Government under the
8 Privacy Act because the forms he filled out in seeking
9 Social Security disability benefits didn't adequately
10 disclose to him that his information might be released
11 to other government agencies for law enforcement
12 purposes.

13 I don't think there's any reason why
14 Congress would necessarily think that an omission on a
15 government form should give rise to a claim for
16 emotional distress damages. There certainly wouldn't
17 have been any analogue for it at common law.

18 JUSTICE GINSBURG: But that's just saying
19 that he didn't have a good claim for relief. But let's
20 take the worst case, where -- where a government
21 official spreads all kinds of false information, or even
22 true but terribly embarrassing information about a
23 person, does it deliberately. Let's take that case,
24 because your rule covers all of them.

25 MR. FEIGIN: Well, in that case, Your Honor,

1 the plaintiff might have a claim under the Federal Tort
2 Claims Act based on a violation of some State law
3 statutory or common law privacy protection. So the
4 category of cases that would have constituted invasion
5 of privacy prior to the Privacy Act might still be
6 available to a plaintiff, who might then recover
7 emotional distress damages against the government.

8 JUSTICE GINSBURG: But wasn't that the very
9 thing that Congress -- why did they pass this in the
10 first place? I mean, Congress was thinking of emotional
11 distress injuries.

12 MR. FEIGIN: Well, they passed it, Your
13 Honor, because they wanted, in the wake of Watergate, to
14 impose a set of detailed substantive requirements about
15 Federal recordkeeping. I think the -- you know, looking
16 through the act, which takes up maybe 30 pages of the
17 petition appendix, it clearly isn't simply a
18 codification of common law invasion of privacy against
19 the Federal Government.

20 It does much, much more than that.

21 JUSTICE GINSBURG: But does --

22 MR. FEIGIN: Your Honor, even if we look
23 just at the disclosure-related provision, it's broader
24 than common law invasion of privacy in two very
25 important ways. So for common law invasion of privacy,

1 a plaintiff would have to prove disclosure of very
2 personal and private information to the public at large.
3 Under the Privacy Act, however, a disclosure even to a
4 single person would constitute a violation of the act,
5 and the information doesn't even have to be private.

6 Let me give a concrete example. So if the
7 government has a record that contains information that
8 someone has a criminal conviction, it might be a
9 violation of the Privacy Act for the contents of that
10 record to be disclosed, even though someone could obtain
11 the same information by going to the court records or
12 potentially looking them up on the Internet.

13 And particularly since violations of Federal
14 law are typically -- typically, the only type of relief
15 a plaintiff can seek for violation of Federal law is
16 equitable relief under the Administrative Procedure Act.
17 I don't think there's any reason to assume that Congress
18 ambiguously, or I think really silently, decided that it
19 was going to ratchet things up to a serious degree and
20 expose the United States to uncapped emotional distress
21 damages under the Privacy Act.

22 JUSTICE GINSBURG: It did set a pretty high
23 bar for the plaintiff to meet, because the plaintiff
24 would have to prove intentional or willful conduct, not
25 negligence, but --

1 MR. FEIGIN: Well, three points on that,
2 Your Honor.

3 First of all, I think if Congress had
4 thought that the limitation to intentional or willful
5 conduct was itself a sufficient limitation on the
6 liability of the United States, it wouldn't have been so
7 reluctant to provide for general damages, or perhaps
8 even for punitive damages.

9 Second, the courts of appeals now generally
10 interpret the intentional or willful requirement to
11 require only something slightly less than recklessness
12 or slightly more than gross negligence, which in
13 practice provides district courts and courts of appeals
14 with a great deal of flexibility to find intentional or
15 willful violations in cases where the Federal Government
16 doesn't believe it should be liable.

17 Third, to the extent the intentional or
18 willful requirement does impose a limitation on a
19 plaintiff's recovery, what actually winds up happening
20 in practice is that plaintiffs or courts will look to
21 all the various technical provisions of the Privacy Act
22 to try to find some violation that can be classified as
23 intentional or willful. So for example, if a plaintiff
24 about whom information has been disclosed can't show the
25 disclosure is intentional or willful, he may try to

1 prove that a violation of the -- of (e)(10), which
2 requires the government to safeguard information, was
3 intentional or willful.

4 With the Court's permission, I would like to
5 reserve the balance of my time.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Mr. Cardozo.

8 ORAL ARGUMENT OF RAYMOND A. CARDOZO

9 ON BEHALF OF THE RESPONDENT

10 MR. CARDOZO: Mr. Chief Justice, and may it
11 please the Court:

12 Embracing the government's view of "actual
13 damages" would mean that the very individuals Congress
14 sought to protect in this act would have no remedy at
15 all for the primary form of harm that was well
16 recognized at common law when this act was passed.

17 To carry out the act's protective purposes,
18 this Court need only give the words "actual damages"
19 their common and ordinary meaning that appears in
20 Black's Law Dictionary: "proven, not presumed,
21 liquidated, punitive, or other forms of damages that are
22 not tied to proof of harm."

23 JUSTICE ALITO: Could I ask you this
24 question about the damages that your client is seeking
25 in this case: if -- if we affirm the Ninth Circuit,

1 would -- are you claiming all of the damages that -- all
2 of the emotional damages that resulted from his criminal
3 conviction, or are you claiming only the emotional
4 damages that would have been suffered by anybody else
5 whose records were turned over to the FAA under the
6 Operation Safe Pilot program?

7 MR. CARDOZO: If you affirm, there will be a
8 proximate causation question that arises on remand. The
9 act requires the damages to be the result of the
10 violation. So he cannot recover for the emotional
11 distress that followed from the prosecution.

12 But as Justice Ginsburg pointed out, we're
13 talking today not just about Mr. Cooper; we're talking
14 about every single person to whom this act applies: the
15 whistleblower who the government chooses to silence by
16 embarrassing and humiliating them --

17 JUSTICE ALITO: But you allege that -- that
18 Mr. Cooper suffered a severe emotional distress when he
19 was confronted with the fact that his records had been
20 turned over. So you're -- you're saying that the
21 court -- that on remand, there would have to be a
22 separation of the degree of distress that he suffered as
23 a result of simply knowing that somebody in the FAA had
24 access to his Social Security records, but disregard the
25 distress that somebody in that situation would naturally

1 feel when confronted with the fact that a criminal
2 violation that he had committed had been exposed?

3 MR. CARDOZO: Yes. And that's the kind of
4 thing judges routinely have to sort through. For
5 example, someone suffers emotional distress and then
6 they lose their job thereafter, and the injury that
7 produces the emotional distress, the job -- the job loss
8 wasn't the proximate cause.

9 Judges -- in fact, we ask juries to do that.
10 In this case, it would be a judge sifting through that
11 and making that determination. As happened in
12 Petitioner Doe's case, the judge could find that the
13 emotional distress claim wasn't sufficient and reject it
14 altogether, but that's the nature of an emotional
15 distress remedy.

16 One thing you didn't hear in that argument
17 almost at all was any discussion of the text of this
18 act, which tells you in at least four separate ways that
19 "actual damages" simply means proven, not presumed,
20 damages.

21 Beginning with the words themselves, that's
22 of course the most common meaning of actual damages, is
23 the one that appears in Black's Law Dictionary. As
24 Justice Sotomayor pointed out, the term of art for
25 economic loss in this arena is "special damages." If

1 that's what Congress meant, presumably it would have
2 used that term, it's the more common way to express one
3 category of damages only that's economic.

4 JUSTICE ALITO: But you agree that the act
5 does not allow recovery for what would have been
6 regarded at common law as general damages?

7 MR. CARDOZO: What would have been regarded
8 at common law as presumed -- the presumed damages, this
9 act doesn't allow. That was peeled off for further
10 study.

11 JUSTICE ALITO: "General damages," that's
12 the term that they peeled off, right?

13 MR. CARDOZO: Right. But by keeping actual,
14 the juxtaposition between actual and general --

15 JUSTICE ALITO: But general damages is a
16 term from -- from the remedies in defamation cases,
17 right?

18 MR. CARDOZO: Yes.

19 JUSTICE ALITO: And there are two types of
20 damages in defamation cases, special damages and general
21 damages and if you -- is that correct?

22 MR. CARDOZO: Correct.

23 JUSTICE ALITO: And you subtract general
24 damages and what do you have left?

25 MR. CARDOZO: But the interesting thing in

1 this case is they didn't take what you have left,
2 special damages, and they used a different term,
3 Congress did, "actual," a term that suggests we are
4 going to require proof of the damages. We are not going
5 to presume them, we are not going to allow speculative
6 damages.

7 JUSTICE ALITO: But the problem is that --
8 that your definition of actual damages and the general
9 definition of actual damages includes some things that
10 fell within the rubric of general damages.

11 MR. CARDOZO: That's true. But several
12 other things in the text of the Act tell you, again,
13 that actual means simply proven, not presumed. If you
14 look at Section 2, where Congress recites findings and
15 the statement of purposes for the Act, the right that's
16 being described here is an individual and personal right
17 to privacy, well understood, well settled at the time to
18 be a right that was primarily nonpecuniary in nature.

19 JUSTICE ALITO: Let me just try this one
20 more time. You -- you say that there is a right to
21 recover actual damages but no right to recover general
22 damages. So what you think is recoverable is actual
23 damages minus general damages?

24 MR. CARDOZO: No. Our position is what is
25 recoverable is actual damages, damages you prove,

1 substantiate, a judge can reject it if they find it
2 unsubstantiated as happened in Petitioner Doe's case --

3 JUSTICE KENNEDY: But -- but we --

4 MR. CARDOZO: -- but you can't presume --

5 JUSTICE KENNEDY: Courts don't -- courts
6 allow recovery for conjectural or speculative damages.
7 That's just -- that's just or am I wrong? Do Federal
8 courts --

9 MR. CARDOZO: No, but this --

10 JUSTICE KENNEDY: -- routinely tell juries,
11 now you can come in with conjectural or special damages.
12 That's not the way the jury are instructed.

13 MR. CARDOZO: But you can in this arena at
14 common law presume damages from the nature of the
15 violation. That is what was carved out, the ability to
16 presume it, rather than present evidence and subject it
17 to proof.

18 JUSTICE BREYER: Can you tell me what your
19 response is to the government's argument that the
20 Privacy Commission which was set up understood the word
21 "actual damages" at the time the way they understand it?
22 What is your response to that? Are they right about
23 that in your opinion?

24 MR. CARDOZO: Apart from the obvious that
25 the post enactment report was --

1 JUSTICE BREYER: No, I'm asking you --

2 MR. CARDOZO: But -- but -- on the
3 underlying point --

4 JUSTICE BREYER: Thank you.

5 MR. CARDOZO: -- several things. The
6 Commission -- this is a -- two paragraphs in a 620-page
7 report that doesn't run through the text of the Act,
8 it's purpose, all of the things that one normally does
9 in statutory construction. So where they draw this
10 conclusion is entirely --

11 JUSTICE BREYER: Okay. So am I right in
12 saying your -- you would agree with them that that is
13 how the Privacy Commission understood the Act, but in
14 your opinion, the Privacy Commission was wrong?

15 MR. CARDOZO: Yes, with one other -- with
16 one other proviso I would add. There is a little bit of
17 ambiguity. You see the Privacy Commission in this two
18 pages was trying to sell Congress on the notion of
19 expanding the remedy, so it wrote on pages 530 of its
20 reports: "If the rights and interests established of
21 the Privacy Act are worthy of protection, then recovery
22 from intangible injuries such as pain and suffering,
23 loss of reputation, or the chilling effect on
24 constitutional rights is a part of that protection.
25 There is evidence for this proposition in common law

1 privacy cases."

2 Surely, Congress knew that very thing.

3 JUSTICE BREYER: And by pain and suffering
4 they mean mental pain and suffering?

5 MR. CARDOZO: Right. Surely, Congress knew
6 that same thing, so when it enacted this Act, it did not
7 mean to cut out the primary form of harm.

8 JUSTICE BREYER: Thank you.

9 MR. CARDOZO: Another --

10 JUSTICE SCALIA: What -- what the government
11 would say is -- is that -- and they have their own
12 dictionary definitions, I don't -- I don't think it's
13 accurate to say that Black's Law Dictionary defines
14 actual damages the way you would have it defined. As I
15 recall, their briefing gives some other definitions from
16 an earlier version of Black's or whatever.

17 But what they say about the Commission
18 understanding, which you acknowledge to be contrary to
19 your understanding of actual damages, what they say is
20 that at least shows that it isn't clear what actual
21 damages means. And -- and in their estimation, once
22 you -- once you establish that it isn't clear, then you
23 trigger the -- the -- the rule that waivers of sovereign
24 immunity will not be considered to have any scope except
25 that scope which is clear.

1 MR. CARDOZO: Well, that's why it's critical
2 to understand the analysis, because you can't say there
3 is a genuine ambiguity unless you understand how they
4 arrived at that conclusion. The meaning of actual
5 damages can vary with the context, but it's usually
6 crystal clear in each context what you are talking
7 about.

8 In this privacy context, it's fairly clear,
9 we have a provision at page 66A of the appendix, Section
10 2B, where Congress recites of purpose of this remedies
11 provision, and it states: "The purpose is to hold the
12 United States liable for any damages which occur as a
13 result of."

14 The notable thing about that statement of
15 purpose, which occur as a result of, lines up precisely
16 with proven, not presumed damages. But any damages
17 which occur as a result of, conflicts directly with the
18 notion of only one category of damages as being
19 authorized. That's Congress' statement of purpose for
20 this very provision. That aligns. Mr. Cooper's
21 construction aligns. The government creates disharmony
22 in the statute.

23 JUSTICE BREYER: This would save you some
24 time, possibly, but my guess is you may know that every
25 State or many States have statutes or tort laws or

1 something against invasion of privacy. Now, you may
2 know how many. And -- and if you know how many, that's
3 helpful. And of those, if you know how many, how many
4 of them, and perhaps all, provide damages for mental
5 suffering caused by a violation of that particular
6 tort-like provision?

7 Do you know anything about those statistics?

8 MR. CARDOZO: Justice Breyer, you have given
9 me a little bit too much credit, I can't give you a
10 number of States, but I can tell you that I am not aware
11 of any State that disallows. It is by far the general
12 rule and I think it's universal that recovery of mental
13 and emotional distress for invasion of the privacy.

14 JUSTICE BREYER: Do you know enough to know
15 if they have done so through the use of a term like
16 "actual damages" that run analogous thereto, or whether
17 they had to have some special form of words?

18 MR. CARDOZO: I don't know that. So,
19 I'll --

20 JUSTICE BREYER: Okay.

21 JUSTICE SCALIA: Of course you are talking
22 about statutes that require that the material have been
23 made public, not that say establish a violation if one
24 agency provides the information to another agency? I
25 mean, as the government points out, this statute goes

1 far beyond any -- any State statutory or common law
2 protections of privacy. It's really very picky, picky.

3 And -- and to say that, you know, whatever
4 emotional harm comes from that is -- is quite different
5 from saying that under State privacy laws emotional
6 distress is compensable.

7 MR. CARDOZO: Yes, but we are here today
8 only talking about the narrow category of cases in which
9 there is an intentional and willful violation. So they
10 knew the law prevented them from doing what they did.

11 JUSTICE SCALIA: Well, that's right. But
12 all you have to know is that you shouldn't give it to
13 the other agency, because you are not making it public.
14 You are not doing the kind of thing that constitutes an
15 invasion of privacy under State law. You just failed,
16 intentionally failed, to follow the very detailed and as
17 I say picky, picky prescriptions contained in the
18 Privacy Act.

19 To say that you get emotional distress for
20 that as opposed to genuine -- what I would call genuine
21 privacy incursions, which State law covers is a
22 different question.

23 MR. CARDOZO: But -- but this provision is
24 covering the range of intentional and willful violations
25 covered in the act. The example of the whistleblower

1 who you want to silence, so you leak the most
2 embarrassing details to the press, shaming and
3 humiliating them in front of friends and family -- don't
4 leave the house for a month, but you haven't lost your
5 job, and you are not out of pocket -- zero remedy, zero.
6 That's the government's construction.

7 And look at section 2, how Congress
8 described this act. They didn't say we're imposing some
9 picayune technical requirements. They are saying we're
10 doing this to safeguard individual rights of privacy.
11 They use the very lingo; they analogize it unmistakably
12 and explicitly to the common law kind of invasion of
13 privacy for which emotional distress is routinely
14 recoverable.

15 JUSTICE SOTOMAYOR: Do you have any
16 statistics on the percentage of actions brought under
17 the Privacy Act in which the plaintiff was able to
18 establish pecuniary harm?

19 MR. CARDOZO: I don't have any statistics on
20 that. The one thing I can tell you is that this has
21 been the law in the Fifth Circuit for well over
22 30 years, and as the government -- and prior to Doe v.
23 Chao the rule was, in most circuits, you didn't have to
24 show any damages. And yet at that point, a good
25 37 years after the act had come into existence, the

1 government sat up here and admitted that far broader
2 construction of the act than we are talking about today
3 had no meaningful effect on the public --

4 JUSTICE SCALIA: You say in the Fifth
5 Circuit or the Ninth Circuit for -- for many years?

6 MR. CARDOZO: This case is -- in -- coming
7 out of the Ninth Circuit, but the Fifth Circuit passed
8 the rule.

9 JUSTICE SCALIA: -- for a long time, yes.

10 MR. CARDOZO: In the early '80s it first
11 recognized emotional distress.

12 JUSTICE SOTOMAYOR: Are you aware of any
13 runaway verdicts based on awards of mental damage proof?

14 MR. CARDOZO: The only case that I'm aware
15 of --

16 JUSTICE SOTOMAYOR: I define runaway awards
17 as those in -- in six figures or above.

18 MR. CARDOZO: No.

19 JUSTICE SOTOMAYOR: Or even high five
20 figures.

21 MR. CARDOZO: The highest I can think of in
22 the moment was a case out of the Fifth Circuit called
23 Jacobs in which a Federal agency revealed -- leaked to
24 the press information falsely suggesting a bank
25 president was a money launderer. He got 100,000 in

1 emotional distress, but that's a pretty extreme
2 situation. The vast majority, it's going to be modest.
3 And I would say he should get \$100,000 in emotional
4 distress. He's an upstanding member of the community
5 and he's being called a common criminal; he may not have
6 suffered any pecuniary loss, but he has suffered actual
7 damages.

8 One other thing about the text that tells
9 you -- again, all of these points, points aligned with
10 Mr. Cooper's construction and produce disharmony to the
11 other side. Look at the breadth of the language that
12 Congress used to waive sovereign immunity in subsection
13 (g) of the act. Recall that the government's
14 construction is only one small category of plaintiffs,
15 who are the victims of intentional and willful
16 violations, can recover. Yet the text says in any suit
17 in which a court determines that there's been
18 intentional and willful violation, the United States
19 shall be liable for actual damages.

20 If what we mean is only one small category,
21 economic damages, is serving as a substantial reduction
22 in the category of cases that could be brought, you
23 would expect to see that limitation appear after the
24 intentional and willful in any suit in which the Court
25 determines there has been willful, intentional violation

1 and the plaintiff has suffered economic loss; because it
2 is a substantially narrowing term.

3 However, if actual damages simply means
4 proven, not presumed, this wording is perfectly natural
5 and flows exactly. Again, every place you look in the
6 text of the act, proven not presumed -- aligns.
7 "Economic only" is a square peg in a round hole in the
8 text of this act.

9 JUSTICE KENNEDY: In -- in your argument do
10 you have to avoid the concession that the term might be
11 ambiguous? I know your position is that liability for
12 damages is expressly waived, but then you stop there,
13 and you -- and you say that, you resist the idea that
14 the definition of actual damages has to be unambiguous.
15 Is that a fair characterization of your argument?

16 MR. CARDOZO: I would modify it slightly.
17 What the government is talking about is an ambiguity in
18 the abstract. They are lifting the two words out of the
19 context of the act. Like any phrase, actual damages can
20 mean different things in different contexts. But in
21 this statute, when you run through the tools of
22 construction, it's not ambiguous; and that's --
23 that's --

24 JUSTICE SCALIA: That -- that's a different
25 point. And the question went to whether you acknowledge

1 the name to be unambiguous. Now what the government
2 says is, of course, the -- the waiver of sovereign
3 immunity, you would acknowledge must be unambiguous, but
4 the government says further, moreover, the scope of the
5 waiver of -- of sovereign immunity must be unambiguous.
6 Whether you have waived it only with respect to
7 pecuniary damages or also with respect to emotional
8 harm, that also must be unambiguous; and -- and you deny
9 that second step, don't you? You think --

10 MR. CARDOZO: Actually we don't, Your Honor.

11 JUSTICE SCALIA: You don't?

12 MR. CARDOZO: And this is how I would
13 clarify it. What the doctrine of sovereign immunity
14 requires is that the waiver be expressed in text and the
15 court can't read it in, it can't add words to the text.
16 If you -- if your intent is to separate out presumed
17 liquidated, punitive, other forms of damages that do not
18 -- are not tethered to proof of harm, actual damages is
19 a phrase that does that precisely because that's what
20 actual means; it means real.

21 There is no ordinary definition of actual
22 where it means pecuniary only, that is -- you get when
23 you use it in certain contexts. So this Court doesn't
24 need to add, expand or read anything into these words
25 "actual damages." It simply needs to give them the

1 meaning that they have in ordinary English definitions,
2 in Black's Law definition. This definition this Court
3 gave to actual damages in the Birdsall case over
4 100 years ago is the same thing: presumed -- proven
5 damages, not presumed. So the waiver of sovereign
6 immunity is here expressed; it doesn't arise by
7 implication.

8 But the one -- but there's another side to
9 the sovereign immunity point that the government never
10 mentions. The court's obligation is dual here. When
11 there has been a waiver, the court can't expand that
12 waiver, but neither can it contract it. You have here
13 the government spinning out theoretical -- theoretical
14 possibilities that actual damages was -- was used in
15 this more peculiar sense; what it really meant was
16 special damages -- to produce a deconstruction of the
17 statute that eviscerates it, leaves most of the people
18 who suffer intentional, willful violation without any
19 remedy at all. And those who have it, to have an
20 economic loss, do not get compensation for the primary
21 form of harm from a privacy --

22 CHIEF JUSTICE ROBERTS: The argument you
23 have made, and I certainly understand it, that this is
24 the Privacy Act, and so it's precisely these types of
25 damages that you would be concerned about, really cuts

1 both ways. I mean, what you are saying is this is a
2 really big chunk of damages, because this is what the
3 whole act was about; and it seems to me that that
4 argument suggests that there is some weight to the
5 government's point that well, if you are going to get
6 into that, you really do need a clearer waiver of
7 sovereign immunity.

8 MR. CARDOZO: Absolutely, but -- but that
9 circles back to my point that if you're going to -- if
10 your intent is to say presumed, not proven, actual fits
11 exactly. Special is the term that wasn't used here. So
12 to - to fault Congress for picking a term that means
13 precisely "proven, not presumed," and say you weren't
14 clear enough, that's asking too much, particularly when
15 they also said, in their statement of purpose, they
16 spoke to the remedies provision and said "any damages
17 which occur as a result of." They used a sweepingly
18 broad language. They did multiple things to say --
19 reveal no doubt about its intent.

20 And recall the rule from the Morissette and
21 Molzof case, case when Congress is legislating against a
22 common law background. The rule is if Congress's
23 silence is taken as an indication that Congress intends
24 to follow established norms, not depart from them, when
25 Congress says actual damages in a privacy context, it's

1 fair to -- it's going to assume that people are going to
2 understand that at common law, actual damages included
3 emotional distress for privacy violations.

4 So rather than assuming that it departed
5 from the common law, we typically require the contrary
6 direction, under Morisette and Molzof, and we don't have
7 that contrary direction here.

8 And you get the same answer as you roll
9 through. You don't need to look -- go past the text,
10 but you get the same answer as you roll through all of
11 the tools of construction: the common law background
12 and the Morisette Molzof Rule points you to the same
13 place. The legislative history. This act, the act that
14 emerged, was a compromise between a far broader remedial
15 scheme that authorized punitive damages, did not have
16 the intentional and willful requirement, had a
17 negligence standard, and a more measured version.

18 The government's construction of this act
19 throws that compromise out of the window and rewrites
20 the act as a one-sided in the government's favor when
21 what clearly happened in the legislature was that a
22 balance was struck. Another thing about the legislative
23 history. Both the House and Senate bills originally had
24 the term "actual damages" in there from the start, and
25 they both had "actual damages" simply as a counterpart

1 to punitive damages. Again, another confirmation.

2 Actual damages.

3 JUSTICE ALITO: Well, suppose this were a
4 common lawsuit for slander per quod, and what was said
5 was that Mr. Cooper received Social Security disability
6 benefits. Now, he would -- and he claims that causes
7 him great distress because of the extrinsic fact that he
8 was known to be a pilot, and therefore, people who --
9 who knew that he was flying around an airplane even
10 though he was so severely disabled that he was entitled
11 to get Social Security disability benefits, that would
12 damage his reputation.

13 Now, the damages that you're seeking, the
14 emotional distress that he allegedly incurred, what
15 would that be? Which -- under what category of damages
16 would that fall?

17 MR. CARDOZO: His -- his economic loss would
18 be special damages.

19 JUSTICE ALITO: Then let's --

20 MR. CARDOZO: The damages he could prove --

21 JUSTICE ALITO: You don't claim any economic
22 loss there.

23 MR. CARDOZO: Right. The damages he could
24 prove would be actual damages.

25 JUSTICE ALITO: No. Under the -- would that

1 be the term that a court -- a common law court would
2 use: actual damages? Wouldn't they ask whether the
3 damages to his reputation and the emotional distress
4 that he suffered therefrom were either -- wouldn't they
5 ask whether that was special or general?

6 MR. CARDOZO: Well, they could also use
7 actual damages, because of course, in the Gertz case,
8 the Court --

9 JUSTICE ALITO: No. Gertz came after the
10 common law. Gertz was a modification of the common law.
11 What would it be at common law?

12 MR. CARDOZO: At -- at common law, it would
13 be general damages, but --

14 JUSTICE ALITO: General damages here are
15 excluded by Congress, right?

16 MR. CARDOZO: They were referred for further
17 study, but what was authorized in the text, the
18 substantive provision, is actual damages, not special
19 damages.

20 If Congress had wanted to peel off the whole
21 piece and require only economic loss, the more common
22 and routine term of art that is used is special damages,
23 which circles back to another important point --

24 JUSTICE SCALIA: But -- but -- but elsewhere
25 in the statute, it's made very clear that Congress did

1 not think it was authorizing general damages, right?

2 Because it set up this commission to recommend whether
3 general damages should be included. Now, what would be
4 the purpose of that commission if indeed actual damages
5 already included general damages?

6 MR. CARDOZO: It doesn't include general
7 damages. They were called presumed damages. Presumed
8 damages. A substantial portion of the compensation
9 ordinarily available would be peeled off under our
10 construction. And this was a distinction that actually
11 appeared in the Gertz case -- where it placed First
12 Amendment limitations on recovery, the Court
13 distinguished between actual damages and presumed
14 damages. So --

15 JUSTICE SCALIA: You -- you would say that
16 actual emotional damages are not -- are not general
17 damages?

18 MR. CARDOZO: I wouldn't say -- I would say
19 you could call them general damages. In the context of
20 this act, what Congress does not choose special damages
21 as the term of what it's authorizing, and instead
22 chooses the broader term, "actual damages."

23 JUSTICE SCALIA: No, but it -- it does use
24 the term "general damages," and makes very clear that it
25 doesn't think this statute covers general damages. So I

1 think -- I think you have to argue that the term
2 "general damages" includes only "presumed" emotional
3 harm and not "proven" emotional harm.

4 MR. CARDOZO: That -- that is exactly our
5 position.

6 JUSTICE SCALIA: Okay.

7 MR. CARDOZO: And the thing I would add to
8 that is general damages -- actual damages was in the
9 statute long before general damages surfaced. It
10 appeared at the 11th hour, and Congress just said let's
11 send that off to the commission. That's important to
12 keep in mind, because it creates a huge question about
13 what Congress meant to peel off. There is no
14 explanation of general damages. It isn't defined. And
15 it arose at the 11th hour.

16 But the important thing is the term it kept
17 in the statute was not "special damages." The term of
18 art that has a pecuniary limitation. It kept the
19 broader term "actual damages," and the term it kept
20 aligns with its statement of purpose, the breadth of the
21 waiver of sovereign immunity and a nonpecuniary
22 expression -- a desire to protect nonpecuniary interests
23 that's throughout the act.

24 Let me wrap up with a couple of observations
25 here. Congress passed this act to restore the citizens'

1 faith in their government, and it made a solemn promise
2 to the American citizens that in cases of intentional
3 and willful violation, the United States shall be liable
4 for actual damages.

5 Today, the government is proposing that
6 "actual damages" be read in a way that renders this act
7 virtually irrelevant. That makes a mockery of that
8 solemn promise. To preserve the vitality of this act,
9 this Court need only give actual damages its most common
10 and ordinary meaning: "proven, not presumed."

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Feigin, you have five minutes remaining.

13 REBUTTAL ARGUMENT OF ERIC J. FEIGIN

14 ON BEHALF OF THE PETITIONERS

15 MR. FEIGIN: Thank you, Mr. Chief Justice.

16 I just have a few points. First of all,
17 Respondent would like the Court look -- would like the
18 Court to look to, quote, "the common and ordinary
19 meaning" of actual damages, and asserts that the term
20 "actual damages" fits exactly here. But no court to
21 consider this issue has ever thought that the meaning of
22 actual damages was plain. You have to look at the
23 context.

24 And the context here includes the exclusion
25 of general damages, which I think Respondent conceded

1 when Justice Alito asked him this question --
2 includes --

3 JUSTICE SOTOMAYOR: Counsel, you seem to be
4 arguing throughout that general damages meant actual
5 damages, when general damages, in my understanding,
6 meant two things: presumed and actual. So why is it
7 illogical for Congress to look at what general damages
8 meant, and pick the meaning that included proven
9 damages, actual?

10 MR. FEIGIN: Well, Your Honor, I think if
11 you look at the sources cited in our brief, as well as
12 the sources cited in his brief -- in particular, I'd
13 refer you to the block quote on page 22, "general
14 damages," that term, most typically refers to a class or
15 a type of damages that could be presumed but could also
16 be proven.

17 And when they are proven -- and I think
18 Respondent effectively conceded this -- they remain
19 general damages. And because Congress decided to think
20 about general damages later, because that would have
21 been such a great expansion of the waiver of sovereign
22 immunity, I don't think the act should be construed to
23 allow those type of emotional distress damages.

24 Now, Respondent would like to --

25 JUSTICE SOTOMAYOR: I'm still confused.

1 General damages meant presumed or actual. Congress says
2 we don't want general damages because it includes
3 presumed. So we are going to use the word "actual."
4 How do you get from that that Congress meant "only
5 pecuniary"? I mean, that has its -- why didn't they
6 just use that? Instead of "actual damages," why didn't
7 they just say "pecuniary damages," if that's what they
8 intended?

9 MR. FEIGIN: Your Honor, I think that's
10 essentially Respondent's argument. He wants to fault
11 Congress for not using the specific term "special
12 damages." But I think that flips the canon of
13 interpreting waivers of sovereign immunity on its head,
14 and requires Congress to unambiguously not waive its
15 sovereign immunity, when in fact, what I think the Court
16 does is precisely the opposite.

17 I also think, Justice Breyer, addressing the
18 Privacy Protection Study Commission, the commission
19 included two of the Congressmen who sponsored the
20 Privacy Act. It agreed with our reading, the reading
21 that we are offering here, of what both actual damages
22 mean and what general damages mean. And -- and not only
23 do they agree with that, but there is a statement in the
24 legislative history that adopts our definition, too,
25 that's discussed in our brief.

1 Now, I think what Respondent essentially
2 wants the Court to do here is to adopt the
3 recommendation of the Privacy Protection Study
4 Commission that the act be expanded to allow both
5 special and general damages, in which case, emotional
6 distress awards would be allowed. Now, there may be
7 some good policy arguments for that, as the Privacy
8 Protection Study Commission said, but the judicial
9 restraint that is embodied in the sovereign immunity
10 canon I think compels the Court not to get out ahead of
11 Congress on this issue.

12 Congress didn't provide emotional distress
13 awards when it passed the act in 1974, it never amended
14 the act to include them, and the act does not provide
15 for them.

16 JUSTICE BREYER: At common law, if you have
17 a minute.

18 Suppose a plaintiff proved that this
19 particular violation of privacy was so terrible he was
20 in bed for a week, he couldn't go to his family's
21 wedding. I mean, the absolute -- the clearest possible
22 proof. Now, would that have been considered general
23 damages or not? It wasn't presumed. It wasn't
24 speculative. It wasn't anything. It's absolute -- tied
25 up.

1 Would that have been considered general
2 damages, or would it have been considered special
3 damages?

4 MR. FEIGIN: Emotional distress, even
5 physical symptoms of emotional distress, are general
6 damages.

7 JUSTICE BREYER: No matter how well proved.
8 No matter how clearly proved.

9 MR. FEIGIN: No matter how they're proved,
10 did you say?

11 JUSTICE BREYER: No matter how clearly they
12 are proved.

13 MR. FEIGIN: That's correct, Your Honor.
14 They're general damages.

15 JUSTICE BREYER: And -- and to verify that,
16 I look at what definition where?

17 MR. FEIGIN: First of all, Your Honor, you
18 can look at page 139 of the Dobbs treatise, which is
19 cited in our brief, which very clearly defines general
20 damages in that fashion. Also, if you look at the
21 second restatement, section 621 and 623, they define
22 general -- they define general damages and emotional
23 distress damages in this context only by reference to
24 proven damages.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Counsel.

3 The case is submitted.

4 (Whereupon, at 12:07 p.m., the case in the
5 above-entitled matter was submitted.)

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